NO. 82961-6

SUPREME COURT OF THE STATE OF WASHINGTON

SCHOOL DISTRICTS' ALLIANCE FOR ADEQUATE FUNDING OF SPECIAL EDUCATION, ET AL.,

Petitioners,

v.

THE STATE OF WASHINGTON, ET AL.,

Respondents.

STATE'S RESPONSE TO BRIEF OF AMICUS CURIAE

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INTRODUCTION

In the State's previous briefing, we established that a "basic education" for students eligible for special education consists of specially designed instructional services funded from two separate but related formulas: (a) the general apportionment allocation (also known as the "basic education allocation," or BEA) and (b) the special education excess cost allocation, which is .9309 times BEA. In other words, for each special education eligible student the State provides to the school district 193 percent of the BEA.

This foundation for special education funding is supported by unambiguous statutory language, by conditions set forth in the Appropriations Act, by the two previous court decisions in this case, and by factual testimony in the record. In the case where 193 percent of the BEA is demonstrably not enough to cover the services provided to students, a district may apply for additional safety-net money.

The amici school districts, like the Alliance, insist that the first component (the BEA) must be ignored. Therefore, they admit that their position requires the courts to disregard entirely the substantial BEA revenues provided to each district for every special education student. That is why Appellants and the amici have raised the untimely argument that Article VIII, section 4, of the Constitution forbids use of the BEA;

that is why they ask the courts to presume (without proof) that the BEA is "already spent"; and that is why they ask this Court to disregard over 100 years worth of precedent governing standards for constitutional challenges to state laws in order to shift the burden of proof from Appellants to the State.

No basis in law or fact justifies the position that both components describe above and supplied for special education students cannot be used to pay for the costs of special education. To the contrary, state law mandates its use for that purpose and the testimony of the Alliance's fact and expert witnesses confirmed that the BEA is used by districts in exactly that way.

A. State Law and Appellants' Witness Testimony Confirm That the BEA Is Available and Used to Defray Special Education Costs.

State law mandates that districts spend both the BEA and supplemental revenue the State provides for special education students on their education. This principle is codified in the Basic Education Act, RCW 28A.150.390, and in the annual Appropriations Act for special education funding. Laws of 2005, ch. 518, § 507. This mandate became the law of the case in unchallenged Findings 12(c), 26 and 27 and unchallenged Conclusion of Law 10.

The Alliance's witnesses at trial admitted that school districts, in fact, understand and comply with this directive, using the entire BEA to cover education costs of special education students. RP 261, 413, 863-4, 2870. Indeed, the Alliance's own expert testified that excluding the BEA to compute a funding shortfall for special education is improper. RP 863-64.[1]

The amici districts, like the Alliance, concede that their shortfall calculations entirely omit the BEA that the State provided them for their special education students. Amici Br. at 4, fn.1. They go on to claim that the "core issue" on appeal is "whether proof of special education underfunding requires districts to prove they also spent basic education dollars providing special education services." *Id.* The answer to this question is a resounding "Yes." To hold otherwise is to ignore both fact and law. Special education funding is calculated to have a BEA component and an excess cost component.

Amici's first argument appears to rest on the simple fact that the Legislature maintains two formulas. Brief of Amicus Curiae at page 6-7.[2]

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[1] The expert frankly admitted that his clients' entire approach to proving inadequate special education funding was incapable of proving underfunding. RP 871-72.

[2] The amici districts cite to *Seattle School District v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978), for the proposition that at that time (prior to enactment of the Basic Education Act) the general apportionment formula was separate from the special education excess cost formula. They could have simply cited current state law for the proposition.

They argue that the two formulas must not be "merged." To be sure, a BEA is generated for each student. A special education excess cost allocation is generated in addition to the BEA for each special education student to cover excess costs not covered by the BEA. However, this observation does nothing to rebut the statutory mandate that a district must use both revenue sources.

Next, the amici districts mistakenly claim that the BEA is always "unavailable" for paying special education costs. They base this contention upon the fact that BEA funding is predicated upon the assumption that it will pay for the "average cost" of an education, just as the funding formula for special education—BEA *plus* .9309 times BEA—is based on the assumption that such funding will pay the "average cost" of the education of a child with special education needs.

The Alliance and the amici confuse funding allocations with actual expenditures. The former predicts the cost of operations prospectively; the latter conforms those predictions to actual expenditures.[3] Relying on the allocations to prove underfunding explains why the Alliance and amici rely on presumptions rather than competent evidence.

Finally, the amici, like the Alliance, are incorrect in claiming that the trial court's Findings do not support unchallenged Conclusion of

[3] If one were automatically the other, there would be no difference between school district budgets and their year-end financial statements.

Law 10 (that districts must prove they have spent all the BEA *plus* all the excess cost allocation before they can contend special education is underfunded). Findings 4 and 5 clearly state that both the BEA and excess cost funding are "based on an average cost" and that the "total allocation" for every special education student is the BEA plus .9309 times the BEA (1.9309 x BEA).

Neither Finding states, nor supports the proposition, that the BEA can be "presumed" spent. Neither Finding states that the basis for the funding formula proves the funds are spent and are "unavailable" to pay for any portion of any student's specially designed instruction. To the contrary, Conclusion of Law 10 confirms that districts must prove they have exhausted both revenue streams on the costs of special education before they can claim they need more funding.

The Findings are therefore consistent with, and support, the unchallenged Conclusion of Law, which supports the Judgment entered below. State law, the trial court's Findings and Conclusions and the undisputed testimony of both sides' witnesses, require resolving this appeal's "core issue" against the Appellants.

B. The 2005 Appropriations Act Unequivocally Mandates That the BEA Be Used to Pay Special Education Costs. That Mandate Is Not Undercut By Article VIII, Section 4 of the State Constitution.

The 2005 Appropriations Act supports and confirms the arguments above, that as a matter of state law, the BEA must be available to support special education students. If there were any doubt about the Legislature's intent in construing RCW 28A.150.390, the following language puts it to rest:

> (1) Funding for special education programs is provided on an excess cost basis, pursuant to RCW 28A.150.390: School districts shall ensure that special education students as a class receive their full share of the general apportionment allocation accruing through sections 502 and 504 of this act. To the extent a school district cannot provide an appropriate education for special education students under chapter 28A.155 RCW through the general apportionment allocation, it shall provide service through the special education excess cost allocation funded in this section.

Laws of 2005, ch. 518, § 507. The reference to sections 502 and 504 incorporates the basic education allocation and adjustments made to employee compensation.[4]

The amici's argument under Article VIII, section 4, is limited to a single sentence to the effect that the constitutional clause does not permit using one legislative appropriation to fill a shortfall in another. Brief of

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[4] *See* Appendix D of Petition for Review for full text of Laws of 2005, chapter 518, sections 502 through 505, and Appendix E for the full text of section 507.

Amicus Curiae at page 7. It is a conclusory statement supported by no legal analysis or citation to legal authority. It assumes a funding shortfall that has never been proven and begs, rather than answers, the question at issue—can a shortfall be proved where BEA funds are not counted? For reasons previously stated, the answer is "no."

The amici's argument posits that the BEA appropriated in section 502 is unavailable to school districts for purposes of supporting special education services because section 502 does not mention "special education." They claim that this violates the command of article VIII, section 4, that each law appropriating funds must "specify the sum appropriated and the object to which it is to be applied." Const. art. VIII, § 4.

Article VIII, section 4, requires only that the Legislature authorize in law the expenditure of public funds by object and by sum; a statutory provision that so instructs or that makes an appropriation is sufficient. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 604, 949 P.2d 1260 (1997). Laws of 2005, chapter 518 satisfies this requirement by specifically authorizing the sums appropriated throughout its sections as the State's appropriation for K-12 public education. Chapter 518, section 507, accordingly contains language addressing all components of

special education funding: the BEA, the excess cost allocation and the Safety Net. Article VIII, section 4, requires no more.

Finally, even if this Court were to agree with amici and appellants that the appropriation violates the letter of Article VIII, section 4, the appropriate remedy is to ensure the Legislature cures the problem by inserting additional language into section 502 or its equivalent in future appropriations acts. It is not to negate the operation of RCW 28A.150.390, which continues to stand on its own as a mandate to apply BEA to special education expenses first. Thus, even if correct, the claim under Article VIII, section 4, would not alter the legal conclusion that school districts must count the BEA in order to provide underfunding.

C. Application of a Portion of the BEA Provided the Amici Districts Eliminates Their Alleged Special Education Shortfalls.

The amici attach a chart as Appendix 1 to their brief that purports to show that they received insufficient state funds for special education for the 2004-05 school year. However, the Court should disregard this chart entirely as it is not based on evidence admitted at trial. The only district financial statements admitted were for the twelve Alliance Districts and these included none of the amici districts. Exs. 501 and 502. Indeed, the trial court excluded the same chart when the amici attached it to their brief at trial because it constituted inadmissible "facts or allegations."

RP 762-763. Matters argued in briefs but not established in the record are not considered on appeal. *Southcenter View Condo Owners Ass'n v. Condo Buildings, Inc.*, 47 Wn. App. 767, 770 (1986), 736 P.2d 1075 (1986).

Even if properly before this Court, the amici's chart is flawed because it does not include any of the BEA these districts received for their special education students. That omission is fatal to their underfunding allegation—as a matter of fact and law. As shown by the chart attached to this brief, application of but a portion of the BEA eliminates the shortfalls.

II. CONCLUSION

The amici and Alliance districts share the misperception that a case for unconstitutionality can be based on presumed facts, can ignore state law and the undisputed evidence of district practices in the funding of, and payment for, special education programs, and can invert the burden of

proof applicable to plaintiffs in every other case.[5] This Court should reject that approach and affirm the rulings and Judgment entered below.

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

ROBERT M. MCKENNA
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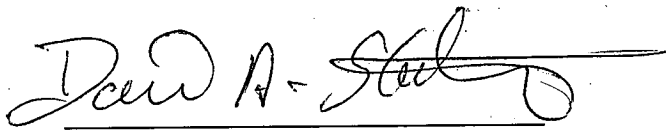

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[5] This Court recently and unequivocally reiterated that challenged state laws implementing Article IX duties are presumed constitutional and that challengers to those laws' constitutionality must prove their case beyond reasonable doubt. *Federal Way Sch. Dist. v. State*, 167 Wn.2d 514, 219 P.3d 941 (2009).

APPENDIX 1

Overage of Special Education Funding for Amicus Districts

School District	Student FTE in 2004-05	Students in Special Education Programs in 2004-2005	Claimed Underfunding in 2004-05 (Amicus Brief & Ex. 131a)[i]	Actual Overage After BEA Applied[ii]
Aberdeen	3,727	558	$515,228	$1,417,652
Anacortes	2,980	360	$564,451	$758,326
Arlington	5,240	700	$600,171	$1,894,199
Asotin-Anatone	568	109	$190,145	$213,774
Bainbridge Island	4,044	551	$1,295,716	$726,084
Battle Ground	12,146	1,420	$85,621	$4,920,611
Blaine	2,143	254	$165,177	$744,620
Central Kitsap	12,354	1,811	$1,760,414	$4,729,546
Central Valley	11,531	1,472	$1,341,073	$4,041,657
Centralia	3,219	449	$242,687	$1,352,054
Cheney	3,270	509	$442,239	$1,464,678
Clarkston	2,656	450	$136,789	$1,556,632
Concrete	758	126	$83,138	$375,289
Deer Park	2,135	283	$15,454	$1,009,345
Dieringer	1,135	81	$273,592	$30,598
Eastmont	5,039	670	$663,775	$1,807,656
Entiat	370	41	$26,773	$119,524
Evergreen (Clark)	23,509	3,039	$3,284,187	$7,376,870
Ferndale	5,094	677	$700,107	$1,708,982
Fife	3,127	304	$280,595	$823,310
Granite Falls	2,311	379	$78,857	$1,251,588
Highline	16,623	2,148	$3,465,617	$4,112,872
Kent	26,040	3,044	$2,126,024	$8,620,046
Lake Chelan	1,241	156	-$69,969	$656,630
Lake Stevens	7,171	928	$921,114	$2,295,245
Lakewood	2,423	330	$214,629	$950,893
Liberty	504	71	$64,583	$193,876
Lynden	2,632	242	$238,617	$635,852
Mary M. Knight	200	20	$1,087	$75,273
Marysville	10,914	1,629	$1,050,969	$4,913,244
Mead	8,595	954	$1,008,428	$2,524,527
Meridian	1,479	222	$337,938	$474,513

School District	Student FTE in 2004-05	Students in Special Education Programs in 2004-2005	Claimed Underfunding in 2004-05 (Amicus Brief & Ex. 131a)[i]	Actual Overage After BEA Applied[ii]
Monroe	6,234	733	$628,833	$1,916,497
Montesano	1,223	150	$6,407	$539,625
Moses Lake	6,480	884	$1,895,940	$1,074,264
Mount Baker	2,294	345	$267,842	$974,243
Mount Vernon	5,488	847	$1,435,501	$1,523,186
Nine Mile Falls	1,592	215	$61,547	$736,551
Nooksack Valley	1,684	271	$270,305	$682,075
North Kitsap	6,690	895	$606,502	$2,588,407
North Thurston	12,460	1699	$3,822,743	$2,335,390
Oak Harbor	5,661	687	$243,562	$2,095,473
Orcas Island	486	64	$159,653	$75,901
Orting	1,924	296	$327,562	$739,480
Port Angeles	4,485	764	$879,420	$1,837,292
Prescott	242	38	$28,723	$114,957
Raymond	533	94	$72,002	$272,075
Republic	487	37	-$191	$131,898
Ridgefield	1,848	203	$0	$730,657
Riverview	2,836	349	$316,176	$946,515
Rosalia	236	19	$62,025	$8,274
San Juan Island	947	106	$23,300	$363,155
Seattle	44,234	5,936	$20,232,015	$1,796,836
Sedro Woolley	4,242	674	$870,264	$1,494,487
Shelton	3,962	597	$366,817	$1,738,299
Shoreline	9,502	1,309	$2,294,722	$2,454,532
Skykomish*	70	18	$74,597	$28,260
South Kitsap	10,521	1517	$268,675	$5,139,377
South Whidbey	2,065	238	$174,726	$685,395
Steilacoom Historical	2,101	311	$116,208	$1,008,632
Sultan	2,121	324	$753,266	$368,811
Tacoma	29,541	4,377	$5,594,113	$9,982,038
Taholah*	223	34	$142,429	-$2,237
Tahoma	6,345	821	$1,373,295	$1,576,103
Toledo	963	146	$19,082	$517,038
Toppenish	963	374	-$66,332	$1,309,268
Tukwila	2,473	290	$272,861	$730,604

School District	Student FTE in 2004-05	Students in Special Education Programs in 2004-2005	Claimed Underfunding in 2004-05 (Amicus Brief & Ex. 131a)[i]	Actual Overage After BEA Applied[ii]
Tumwater	5,921	775	$657,407	$2,136,525
Union Gap	552	92	$45,423	$273,213
University Place	5,126	626	$353,651	$1,914,748
Vancouver	21,174	2,756	$123,172	$9,588,272
Waitsburg	351	52	$37,186	$159,017
Washougal	2,730	296	$328,820	$694,866
White River	4028	584	$214,996	$1,890,461
Winlock	766	82	$42,950	$265,751
Yakima	13,331	1,810	$1,754,568	$4,646,243
Yelm	4,680	570	$762,266	$1,271,410
Total Overage for All Amicus Districts				**$135,129,828**

[i] The totals in this column are taken Exhibit 131a, which contains identical representations of underfunding for each of the Amicus Districts to those in Appendix A to the Brief of Amici Curiae except for instances where the analysis in Appendix A yields no claimed underfunding. In those instances, Appendix A does not show the corresponding overages so amounts are taken from Exhibit 131a instead of Appendix A for accuracy of presentation. Respondents' analysis includes the totals in this column in order to demonstrate the actual overage in special education funding that would exist were the amounts in this column to be accepted as accurate.

[ii] Source: Exhibit 41. The Statewide December 1 Child Count was used as the basis to determine the relative percentage of 3-5 year-old special education students as compared to the total 3-21 year-old special education student population. This percentage was applied to the total 3-21 BEA FTE Enrollments from the 1220 Reports (Exhibit 45) to arrive at an estimate of the age 6-21 population for each Amicus District. The total for the estimated age 6-21 student population for each district was then multiplied by the relevant BEA Rate from the 1220 Reports (Exhibit 45). The resulting amounts were next reduced by the claimed underfunding amounts in Appendix A to the Amicus brief to arrive at the amounts shown in the "Actual Overage After BEA Applied" column. For simplicity of presentation, the unenhanced BEA was used for this chart. Most students generate an additional amount reflected in an enhanced general apportionment called the enhanced BEA. RP 157. Were the enhanced BEA to be used in this calculation, the overage of revenues over expenditures shown in this chart would have been even greater. The BEA for each student is distributed to school districts based on Full Time Equivalencies (FTE) rather than headcount. RP 157. A small number of students in the 6-21 age group attend school less than full time and do not generate a full 1.0 FTE BEA. In order to compensate for this, five-year old students, who are typically in kindergarten and receive a 0.5 FTE BEA, have not been included in this analysis. RP 160. If they had been, the overage of revenues over expenditures shown in this chart would have been even greater.

* The Taholah and Skykomish School Districts are small, unique, districts with total resident BEA eligible FTE enrollments of only 222.8 and 70.49 students, respectively. In 2004-2005, Taholah had a special education enrollment that was 2.51 percentage points greater than the 12.7% index for excess cost funding. See Ex. 45: 2004-05 1220 All Districts.pdf, p. 252. In 2004-2005, Skykomish had a special education enrollment that was 12.67 percentage points greater than the 12.7% index for excess cost funding. See Ex. 45: 2004-05 1220 All Districts.pdf, p. 229. The trial court addressed the issue of access to additional funds for districts like Taholah and Skykomish in

its opinion. CL 13. In an attachment to the declaration of Stephen J. Nielsen in support of a similar Amicus brief submitted to the trial court, Taholah School District asserted that $19,877 of its claimed 2004-2005 funding deficit was attributable to a lack of excess cost funding for students over the 12.7% index. CP 133. In light of the trial court's opinion, $19,877 was backed out of the deficit shown for Taholah in the "Actual Overage After BEA Applied" column. The remaining -$2,237 amount might have been addressed through Safety Net funding, however, Taholah School District chose not to apply for Safety Net funding in 2004-2005. See Ex. 588. The record contains a similar claim that $34,353 of the Skykomish's perceived 2004-2005 funding deficit was attributable to a lack of excess cost funding for students over the 12.7% index. Ex. 43c, p. 3. When this amount is backed out of the negative total in the "Actual Overage After BEA Applied" column, an apparent $6,093 funding deficit becomes an apparent $28,260 funding overage. Since neither of these districts chose to participate as parties to the lawsuit, the record is accordingly underdeveloped.

CERTIFICATE OF SERVICE

I certify that I served a copy of the preceding *State's Response to Brief of Amicus Curiae* on all parties or their counsel of record on the date below as follows:

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